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No. 82 - 27

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARINA POINT, LTD., a limited partnership without subsidiaries or affiliates,

Petitioner,

v.

STEPHEN WOLFSON AND LOIS WOLFSON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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c. That in other contexts some courts have determined that age can be an appropriate basis of classification does not raise a federal issue.

d. Even assuming that the California Supreme Court did change or raise the standard of analysis of prohibited discrimination under the California statute, no federal or constitutional question is presented.

e. Even assuming that the California Supreme Court's recognition of a possible exception for senior citizens' housing creates a vagueness in the statute, petitioner is without standing to assert such vagueness.

QUESTIONS PRESENTED

1. The petition should be denied for petitioner's failure to conform to the requirements of Supreme Court Rule 21 and meet the burden of demonstrating from the record that the United States Supreme Court has jurisdiction to review on certiorari.

2. The challenge to California's procedure for the appointment of interim Supreme Court Justices was not presented to the California Court by timely or proper petition and was therefore not considered or passed upon by that Court, so that this Court is without jurisdiction to review by certiorari.

3. Petitioner has waived any objection to California's Procedure for the appointment of interim Supreme Court Justices by failing to raise it by timely motion to the Court below at its first opportunity and by submitting itself to the jurisdiction of the Court without objection.

4. The petition fails to raise a federal question.

   a. The petition does not even purport to attack the actual holding of the California Supreme Court, that the California Civil Rights Act prohibits landlords' exclusion of the class of children from apartment housing accommodations.

   b. Petitioner's arguments that the California Supreme Court "ignored" the findings of the trial court with respect to children as a class, and decided the case on evidence outside the record, mean only that Petitioner believes that the judgment of the California Supreme Court is not adequately supported by the evidence or findings, and therefore presents merely an issue of evidence and inference not appropriately reviewable by this Court on certiorari.

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2. The challenge to California's procedure for the appointment of interim Supreme Court Justices was not presented to the California Court by timely or proper petition and was therefore not considered or passed upon by that Court, so that this Court is without jurisdiction to review by certiorari.

3. Petitioner has waived any objection to California's Procedure for the appointment of interim Supreme Court Justices by failing to raise it by timely motion to the Court below at its first opportunity and by submitting itself to the jurisdiction of the Court without objection.

4. The petition fails to raise a federal question.

a. The petition does not even purport to attack the actual holding of the California Supreme Court, that the California Civil Rights Act prohibits landlords' exclusion of the class of children from apartment housing accommodations.

b. Petitioner's arguments that the California Supreme Court "ignored" the findings of the trial court with respect to children as a class, and decided the case on evidence outside the record, mean only that Petitioner believes that the judgment of the California Supreme Court is not adequately supported by the evidence or findings, and therefore presents merely an issue of evidence and inference not appropriately reviewable by this Court on certiorari.

c. That in other contexts some courts have determined that age can be an appropriate basis of classification does not raise a federal issue.

d. Even assuming that the California Supreme Court did change or raise the standard of analysis of prohibited discrimination under the California statute, no federal or constitutional question is presented.

e. Even assuming that the California Supreme Court's recognition of a possible exception for senior citizens' housing creates a vagueness in the statute, petitioner is without standing to assert such vagueness.

PRELIMINARY STATEMENT

In *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115, the California Supreme court held, under California law, that a landlord's exclusion of all children, as a class, from apartment accommodations was unlawful, and reversed the judgment of the trial court in the underlying unlawful detainer action, which had evicted Respondents (Defendants-Appellants below) from their apartment pursuant to Petitioner's termination of their lease on the sole ground that they had had a child.

More precisely, the California Supreme Court reaffirmed in *Wolfson* its long-established construction of the State's civil rights law, the Unruh Civil Rights Act, California Civil Code, §51 *et seq.*, as confirmed by legislative acceptance, that the Act prohibits "all arbitrary discrimination" (*In re Cox* (1970) 3 Cal. 3d 205, 90 Cal. Rptr. 24, 474 P.2d 992), and held, pursuant to that standard, that the exclusion by Petitioner from its apartment units of all children, as a class or group, because such exclusion was based upon class or group membership alone rather than individual's conduct, was such arbitrary discrimination as the Act prohibited.[1]

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[1]By settled principles of California Law, "arbitrary discrimination" in violation of the standards contained in the California Civil Rights Act states an affirmative defense to an unlawful detainer action. *Abstract Investment Co. v. Hutchinson* (1962) 204 Cal. App. 2d 242, 22 Cal. Rptr. 309. Petitioner, in the proceeding below, admitted that its sole reason for its refusal to renew Respondents' lease, pursuant to which the unlawful detainer action was brought, was the presence of Respondents' minor child. Thus, only a question of law was presented: whether the exclusion of children as a class from apartment accommodations was "arbitrary discrimination" under the California Civil Rights Law.

The Petition for Writ of Certiorari ("Petition") does not raise—or even purport to raise—any constitutional challenge to the holding of the California Supreme Court that a landlord's exclusion of children as a class from apartment housing accommodations is unlawful. At no time does the Petition even suggest that the Unruh Act, as construed by the California Supreme Court in *Wolfson*, violates the Fourteenth Amendment to the United States Constitution, or any other constitutional provision. Indeed, by adverting to the statutes of ten other states which prohibit the exclusion of families from rental housing on the ground that there is a child in the family, Petitioner effectively concedes that the prohibition of such discrimination is within the states' police power, and therefore immune from attack under the Fourteenth Amendment.

Rather, Petitioner seeks to predicate jurisdiction to review by certiorari upon two other issues, one of which was neither presented to nor passed upon by the California Supreme Court, or any other court below and the other one of which is, in effect, merely an argument that the judgment of the California Supreme Court is not properly supported by the evidence in the record.

Thus, the Petition fails to show either that this Court has jurisdiction to review the judgment of the California Supreme Court, that any federal or constitutional question is presented, or that any reason exists for this Court's exercise of its discretion to grant certiorari (U.S. Supreme Court Rule 17.)

STATEMENT OF THE FACTS

The facts are recited in the Opinion of the California Supreme Court (Appendix "A" to Petition), and need be but briefly stated. Respondents STEPHEN AND LOIS WOLFSON resided as tenants in Petitioner's apartment complex. The Wolfsons' lease contained a provision prohibiting occupancy by children under 18 years of age. Petitioner rented to families with children at the time

Respondents leased their unit, but subsequently promulgated a policy to exclude all families with children and pregnant females. In September 1975 a son, Adam, was born to Respondents; Respondents continued to reside in the apartment. In November, 1976, Petitioner discovered the presence of the child and informed Respondents that their lease would not be renewed. It was admitted by Petitioner that its sole reson for refusing to renew the lease was the presence of the child, and that but for the child the lease would have been renewed. After two short extensions of the lease granted by Petitioner, during which Respondents unsuccessfully sought alternative housing accommodations for themselves and their child, Respondents refused to surrender the apartment, and Petitioner initiated an unlawful detainer action in the Municipal Court for the Culver Judicial District, County of Los Angeles, California. In their answer to the complaint the Wolfsons alleged as an affirmative defense, *inter alia*, that Petitioner's refusal to renew their lease, and their exclusion by Petitioner from the apartment complex, on the sole ground that they had had a child, was "arbitrary discrimination" in violation of the California Civil Rights Act (Unruh Act), California Civil Code, §51 *et seq.* There is no support in the record for the gratuitous comments by Petitioner in the Statement of Facts (Petition, p. 3.) that the Wolfsons concealed the presence of the child or represented that he was visiting. (See Findings of Fact and Conclusions of Law, Appendix "D" to Petition.)

Judgment in the trial court was for Petitioner, as Plaintiff. In a Memorandum Opinion the trial court, although recognizing that Petitioner, as a "business establishment," was subject to the Unruh Act, concluded that the practice in question did not violate any prohibited discrimination because discrimination against children or families with children was not expressly prohibited by the wording of the Statutes or by prior judicial determination. The California Supreme Court reversed on that ground.

ARGUMENT

I.

THE PETITION SHOULD BE DENIED FOR PETITIONER'S FAILURE TO CONFORM TO THE REQUIREMENTS OF SUPREME COURT RULE 21.

Scattered throughout the Petition are passing references to various documents purportedly filed at one stage or another of the proceedings below in which, in some unspecified form, the questions sought to be reviewed by this Court are said to have been "raised" in the state court proceedings. None of the documents referred to, which are necessary for this Court's jurisdiction, are set forth or quoted in the Petition or contained in its Appendix.

Rule 21.1(h) of the United States Supreme Court Rules provides:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method and manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (. . .) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.
>
> "Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix. . . ."

Rule 21.1(h), by its terms, requires the Petition to demonstrate affirmatively the jurisdictional facts contained in the record below, including particularly the facts showing that the federal questions were properly and timely raised at the appropriate stage of the proceeding below and passed upon by the court whose judgment is sought to be reviewed as part of its decision, since those elements are conditions to the Supreme Court's jurisdiction. It is settled that the burden is upon the petitioner to demonstrate those jurisdictional facts to this Court.

Although the Petition claims (p.5) that certain issues, said to be federal questions, were raised in certain briefs (none of which antedate the transfer of the cause to the California Supreme Court, and only one of which antedates that Court's judgment), no portions of those briefs or of the record are specified or set forth, nor are any contained in the appendix to the Petition.

Therefore, this Court has nothing before it from which it can determine that it has jurisdiction to review the judgment of the California Supreme Court herein. Since, by well settled principles, the burden is upon the Petitioner to demonstrate affirmatively that the U.S. Supreme Court has jurisdiction, Petitioner's failure to make the necessary showing requires denial of the Petition.

II.

THE CHALLENGE TO CALIFORNIA'S PROCEDURE FOR THE APPOINTMENT OF INTERIM SUPREME COURT JUSTICES WAS NOT PRESENTED TO THE CALIFORNIA COURT BY TIMELY OR PROPER PETITION AND WAS THEREFORE NOT CONSIDERED OR PASSED UPON BY THAT COURT.

Petitioner seeks to raise—for the first time—a constitutional challenge to the California procedure for the

appointment of interim Supreme Court Justices, presumably under the due process clause of the Fourteenth Amendment to the United States Constitution. This issue has never been presented to or determined by the California Supreme Court, or any other court below in this action, and this Court is therefore without jurisdiction.

Petitioner refers enigmatically ("Statement of the Facts," Petition, p. 5) to a document entitled "Supplemental Brief in Support of Petition for Rehearing" which Petitioner *attempted* to file with the California Supreme Court on March 2, 1982 (seven days after Petitioner's filing of its Petition for Rehearing on February 23, 1982, which was the date upon which the time for filing such Petition expired). Petitioner admits that the issue sought to be raised was entirely new, never having been raised before to the California Court, and was only raised for the first time in the purported "Supplemental Brief." Inasmuch as the document attempted to present an entirely new issue it was not, in fact, a "supplemental" brief, but nothing more than an untimely Petition for Rehearing. Having been filed not only after the filing of the Petition for Rehearing, but after the time for filing such Petition had expired, it was both untimely and improper under the California Rules of Court, and, quite properly, the Clerk of the Supreme Court rejected the submission and refused to file it.

The procedure for petitioning California appellate courts, including the California Supreme Court, for rehearing is set forth in Rule 27 of the California Rules of Court. The provision for time of filing of the petition (Rule 27(b)) is mandatory, by its own terms:

> "(a) [Power to grant rehearing] The Supreme Court or Court of Appeal may grant a rehearing after its own decision in any cause except the denial by a Court of Appeal of a petition for a writ within its original jurisdiction without

> issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. A rehearing may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion, prior to but not after the time the decision becomes final therein.
>
> "(b) [Time for filing petition] A party seeking a rehearing either in the Court of Appeal or in the Supreme Court, *must* serve and file a petition therefor within 15 days after the filing of the decision." [Emphasis added.][2]

Thus the only document in which petitioner even claims to have raised the question sought to be reviewed was untimely filed, rejected for filing by the Clerk of the California Supreme Court, and has therefore never been either presented to or passed upon by the California Supreme Court, which denied the Petition for Rehearing without opinion (Petition, Appendix C, page 56).[3]

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[2]The full text of Rules 15, 27 and 28 of the California Rules of Court are set forth in Appendix "A" to this brief.

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[3]The document would also appear to be unauthorized under the California Rules of Court which require the grounds and arguments on the basis of which a hearing or rehearing by the California Supreme Court is sought to be contained in the single-document petition. See California Rules of Court, Rule 28(d)(3), Appendix A to this brief, p. 29:

> "The Petition shall be a single document including a brief in support of the Request for Hearing. All contentions in support of the Petition shall be included therein, including all legal authorities and argument. . . ."]

Moreover the California Supreme Court will not hear issues raised

(footnote continued on following page)

Proper and timely presentation of the federal question to the court whose judgment is sought to be reviewed is a prerequisite to the United States Supreme Court's jurisdiction to review the judgment on Writ of Certiorari. (Rules of the United States Supreme Court, Rule 21.1(h).) In order to give the Supreme Court of the United States jurisdication to review a final judgment of the highest court of a state, the claim of federal right must be asserted at the proper time and in a proper manner by pleading, motion or other appropriate action under the state system of pleading and practice; and upon the question of whether or not such claim has been so asserted, the decision of the state court is binding upon the United States Supreme Court when it is clear that such decision was not for purposes of evading the claim of federal right. *Hartford Life Ins. Co. v. Johnson* (1919) 249 U.S. 490, 39 S.Ct. 336, 63 L.Ed. 722. To confer jurisdiction to review the state court decision, moreover, it must be shown not only that there was a federal question which might have been raised and decided in the court below, but that the issue was actually brought to the attention of the court and the judgment founded upon a decision upon that issue. *Grand Gulf Railroad & Banking Co. v. Marshall* (1852) 53 U.S. 165, 13 L.Ed 938. Compare also such cases as *De Baker v. Brainard* (1964) 396 U.S. 28, 70 S.Ct. 163, 24 L.Ed.2d 148; *Ellison v. Koswig* (1928) 276 U.S. 598, 48 S.Ct. 320, 72 L.Ed. 724.

In the case at bar, it is manifest that not only was the issue now sought to be raised by Petitioner neither timely

(footnote continued from previous page)

for the first time in a Petition for Rehearing (*Sanders v. Howard Park Co.* (1948) 86 Cal. App. 2d 721, 195 P.2d 898; *People v. Mascotti* (1962) 206 Cal. App.2d 772, 24 Cal. Rptr. 679; *City of San Marino v. Roman Catholic Archbishop of Los Angeles* (1960) 180 Cal. App. 2d 657, 4 Cal. Rptr. 547; see *Ritchey v. Villa Nueva Condominum Association* (1978) 81 Cal. App. 3d 688, 698, 146 Cal. Rptr. 695, 701-702; compare United States Supreme Court Rule 21.3).

nor properly presented to the California Supreme Court, but that the California Supreme Court never had the issue before it for determination, and therefore never determined the issue. Under similar circumstances, where no federal question was raised prior to a Petition for Rehearing in the state Supreme Court, which was denied without more, and the record, as here, contained no actual showing of the presentation of the issue to the court below upon which the Supreme Court's jurisdiction could be based, an appeal was required to be dismissed for want of a properly presented substantial federal question. *McGarrity v. Delaware River Bridge Commission* (1934) 292 U.S. 19, 54 S.Ct 565, 78 L.Ed. 1095, *reh. den.* 292 U.S. 607, 54 S.Ct. 771, 78 L.Ed. 1468.

Numerous cases hold that certiorari will be denied or where granted, dismissed as improvidently granted, where the record fails to disclose that the petitioner raised the issue in the state courts below and/or that the state court determined the issue. (See, e.g., *Missouri P.R. Co. v. Hanna* (1924) 266 U.S. 184, 45 S.Ct. 36, 69 L.Ed. 235; *Millingar v. Hartupee* (1868) 73 U.S. 258, 18 L.Ed. 829; *Abbott v. Tacoma Bank of Commerce* (1899) 175 U.S. 409, 20 S.Ct. 153, 44 L.Ed. 217; *Montana ex rel. Haire v. Rice* (1907) 204 U.S. 291, 27 S.Ct. 281, 51 L.Ed. 490; *Cockroft v. Vose* (1872) 81 U.S. 5, 20 L.Ed. 875; *Warfield v. Chaffe* (1876) 91 U.S. 690, 23 L.Ed. 383.) In *New York Life Ins. Co. v. Hendren* (1876) 92 U.S. 286, 23 L.Ed. 709, it was held that the jurisdiction of the United States Supreme Court over decisions of state courts is derived solely from the questions presented and decided, and that it must appear in the record that such questions were actually presented to the court below and not merely that they might have been brought into the case. To give the Supreme Court jurisdiction, it must appear that the point on which Plaintiff relies was made in

the Court below and actually decided against the party seeking review by the state court. *Maxwell v. Newbold* (1856) 59 U.S. 511, 15 L.Ed. 506; *Hoyt v. Shelden* (1962) 66 U.S. 518, 17 L.Ed. 65; *McGoldrick v. Compagnie Generale Transatlantique* (1940) 309 U.S. 430, 84 L.Ed. 849, 60 S.Ct. 670.

Therefore, the failure of Petitioner to raise the issue by timely Petition for Rehearing to the California Supreme Court, as required under California Practice, as a result of which it was never presented to or ruled upon the California Court, precludes review of the issue here.

III.

PETITIONER HAS WAIVED ANY OBJECTION TO CALIFORNIA'S PROCEDURE FOR THE APPOINTMENT OF INTERIM SUPREME COURT JUSTICES BY FAILING TO RAISE IT BY TIMELY MOTION TO THE COURT BELOW AT ITS FIRST OPPORTUNITY AND BY SUBMITTING ITSELF TO THE JURISDICTION OF THE COURT WITHOUT OBJECTION.

Even if the challenge to the appointment procedure had been included in the Petition for Rehearing to the California Supreme Court filed within the statutory period, it would nonetheless have been untimely, Petitioner having waived the issue by failing to raise it at the first opportunity and having submitted itself to the jurisdiction of the California Supreme Court without objection.

As the Petition indicates ("Statement of the Case," Petition, p. 3) the California Court of Appeals transferred the case to itself for hearing and determination (as permitted under California Rules of Court, Rule 62) and

filed a decision. The Honorable Otto M. Kaus, now a Justice of the California Supreme Court, was then Presiding Justice of Division 5 of the California Court of Appeals for the Second Appellate District, and was a participating member of the panel which determined the cause. (See Vacated Opinion, *Marina Point, Ltd. v. Wolfson*, published at 158 Cal. Rptr. 669 at p. 679, showing Kaus, J., concurring.)

By order of the Chief Justice of California filed June 18, 1981, this matter was placed upon the Supreme Court calendar for oral argument on August 5, 1981. (Copies of the Order and Calendar Notice are included in Appendix B hereto). At that time, there were two vacancies on the California Supreme Court by reason of the death of Justice Wiley Manual and the resignation of Justice William Clark, and Justices Otto M. Kaus and Allen E. Broussard had been appointed to the vacancies by California Governor Edmund Brown, and approved by the California Judicial Council, so that their confirmation and appointment to the bench was then anticipated as a relative certainty. Accordingly, the Chief Justice of California, pursuant to the very procedure under attack herein, had appointed them to participate in the panels hearing the cases placed upon the hearing calendar of the Supreme Court for August 3, 4 and 5, 1981.

Section 170a of the California Code of Civil Procedure prohibits the participation in an appellate or higher appellate proceeding by a judge or justice who has participated in a determination thereof below:

> "No justice or judge before whom a cause or question may have been tried or heard, shall sit or act, in any appellate tribunal, on the trial or hearing of such cause or question."

By operation of this provision, Justice Kaus, even if confirmed, was barred as a matter of law from partici-

pating in the California Supreme Court panel hearing this case.

This problem was called to Petitioner's attention by a letter dated June 23, 1981 to the Chief Justice of California, a copy of which was transmitted to Petitioner's counsel. (A copy of the letter is contained in Appendix C hereto.)

Therefore, as early as June 23, 1981, well before the hearing, and more than seven months before the filing of the opinion by the California Supreme Court, since there were then two vacancies on the California Supreme Court one of which was proposed to be filled by Justice Kaus, who was disqualified from hearing the case, Petitioner knew that a Justice Pro Tem would necessarily be appointed by the Chief Justice to participate in the decision of the cause, and knew presumptively, therefore, that such Justice would necessarily be appointed pursuant to the procedure Petitioner now seeks to challenge. Nonetheless, Petitioner submitted itself to the jurisdiction of the Court without objection.

Under these circumstances, since Petitioner knew of the problem and could have interposed a timely constitutional objection to the appointment procedure by motion or petition directed to the California Supreme Court, even the Petition for Rehearing timely filed was insufficient to raise the issue (see cases cited, *ante* fn. 3), precluding review by the United States Supreme Court on Writ of Certiorari; and where, as is the actual case here, it was *not* raised by timely or proper Petition for Rehearing, manifestly this Court is without jurisdiction.[4]

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[4]Petitioner's argument that *two* justices of the California Supreme Court panel were appointed by the Chief Justice pursuant to the procedure under attack, and the inclusion of Justice Mathew O. Tobriner as such "appointed" justice, must be dismissed as frivolous; the late Justice Tobriner was a sitting California Supreme Court

(footnote continued on following page)

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Justice during the entire process of Petition, Answer and briefing before that Court, and sat and participated with the panel which heard the oral arguments; he resigned from the judiciary effective January 4, 1982, about a month before the filing on February 8, 1982 of the Opinion, which he authored. It is obvious, therefore, that it was as a sitting Justice that he made his decision and wrote the opinion.

Certain of the issues respecting the pro tem appointment process that Petitioner now seeks to bring before this Court as "constitutional" issues have been determined by the California courts under that state's laws and constitution, and are now settled California constitutional law. See *Mosk v. Superior Court* (1979) 25 Cal. 3d 474, 447-448, 159 Cal. Rptr. 494, 503, 601 P.2d 1030, holding that since the Chief Justice of the California Supreme Court has constitutional authority to assign judges from lower courts to the Supreme Court to replace disqualified Supreme Court Justices, it is not necessary for the California Supreme Court to adopt the United States Supreme Court's procedure of letting the lower court judgment stand where there is no quorum of qualified justices. In *Estate of Zahn v. Security Pacific National Bank* (1971) 16 Cal. App. 3d 106, 93 Cal. Rptr. 810, *cert. den.*, 404 U.S. 938, 92 S.Ct 269, 30 L.Ed.2d 251, *reh. den.* 404 U.S. 996, 92 S.Ct 5341, 30 L.Ed.2d 549, the appellant unsuccessfully contended that the trial judge lacked authority and jurisdiction to sit when the matter was heard and determined, on the ground that he was a retired judge of the superior court assigned by the Chief Justice of the California Supreme Court, Roger J. Traynor. See also *Western Sierra, Inc. v. Ramos* (1979) 97 Cal. App. 3d 484, 486-487, 158 Cal. Rptr. 753, 755, holding that a trial judge, who had the case pending before him at the time of his retirement, could decide it after his retirement upon reappointment by the Chief Justice for the specific purpose of hearing the case to its final determination. See also *Martello v. Superior Court* (1927) 202 Cal. 400, 406, 261 P. 476; *Reimer v. Firpo* (1949) 94 Cal. App. 2d 798, 800-801, 212 P.2d 23, *Garthlan v. C.A. Hooper & Co.* (1918) 177 Cal. 414, 429, 170 P. 1115; *Bartholomae Oil Corp. v. Superior Court* (1941) 18 Cal. 2d 726, 729-730, 117 P.2d 674).

IV.

THE PETITION FAILS TO RAISE A FEDERAL QUESTION.

A. The Petition Does Not Even Purport To Attack The Actual Holding Of The California Supreme Court Or Its Construction Of The Unruh Act.

At the threshhold, it must be noted that the Petition does not even purport to attack as unconstitutional the actual holding of the California Supreme Court, that age discrimination in housing, the exclusion of children from apartment accommodations, is prohibited under the California Civil Rights Act, California Civil Code, §51, *et seq.*, or to argue against the constitutionality of the construction of the Act by the California Supreme Court.

Such an attack could be based *only* upon an argument that the Court's construction of the Act, by prohibiting Petitioner from discriminating against children and families with children, was a denial to Petitioner of *its* rights under the Equal Protection and/or Due Process Clauses of the Fourteenth Amendment of the United States Constitution. An examination of the "Questions Presented" (Petition, p. 2), however, shows that no such issue is specified, and it is well settled that on Certiorari, except for jurisdictional questions, not at issue here, this Court ordinarily limits consideration to the questions presented by the Petition for the Writ. *Alice State Bank v. Houston Pasture Co.* (1918) 247 U.S. 240, 62 L.Ed. 1096, 38 S.Ct. 496; *Webster Electric Co. v. Splitdorf Electrical Co.* (1924) 264 U.S. 463, 68 L.Ed. 792, 44 S.Ct. 342; *Steele v. Drummond* (1927) 275 U.S. 199, 72 L.Ed. 238, 48 S.Ct. 53; *Sanitary Refrigerator Co. v. Winters* (1929) 280 U.S. 30, 74 L.Ed. 147, 50 S.Ct. 9; *Gunning v. Cooley* (1930) 281 U.S. 90, 74 L.Ed. 720, 50 S.Ct. 231; *Olson v. United States* (1934) 292 U.S. 246, 78 L.Ed. 1236, 54 S.Ct. 704; *Helvering v. Taylor* (1935) 293 U.S.

507, 79 L.Ed. 623, 55 S.Ct. 287; *Clark v. Williard* (1935) 294 U.S. 211, 79 L.Ed. 865, 55 S.Ct. 356, 98 ALR 347; *Washington, Virginia & Maryland Coach Co. v. NLRB* (1937) 301 U.S. 142, 81 L.Ed. 965, 57 S.Ct. 648; *Crown Cork & Seal Co. v. Ferdinand Gutmann Co.* (1938) 304 U.S. 159, 82 L.Ed. 1265, 58 S.Ct. 842; *General Talking Pictures Corp. v. Western Electric Co.* (1938) 304 U.S. 175, 82 L.Ed. 1273, 58 S.Ct. 849; *Helis v. Ward* (1939) 308 U.S. 365, 84 L.Ed. 327, 60 S.Ct. 283, *reh. den.* 308 U.S. 640, 84 L.Ed. 531, 60 S.Ct. 385; *National Licorice Co. v. NLRB* (1940) 309 U.S. 350, 84 L.Ed. 799, 60 S.Ct. 569; *Dickenson Industrial Site, Inc. v. Cowan* (1940) 309 U.S. 382, 84 L.Ed. 819, 60 S.Ct. 595, *reh. den.* 309 U.S. 698, 84 L.Ed. 1037, 60 S.Ct. 806; *Memphis Natural Gas Co. v. Stone* (1948) 335 U.S. 80, 92 L.Ed. 1832, 68 S.Ct. 1475 (per opinion of Reed, Douglas, and Murphy, JJ.); *United States v. Penn Foundry & Mfg. Co.* (1949) 337 U.S. 198, 93 L.Ed. 1308, 69 S.Ct. 1009, *reh. den.* 338 U.S. 840, 94 L.Ed. 514, 70 S.Ct. 32; *Radio Officers' Union, etc. v. NLRB* (1954) 347 U.S. 17, 98 L.Ed. 455, 74 S.Ct. 323, 41 ALR2d 621; *Mazer v. Stein* (1954) 347 U.S. 201, 98 L.Ed. 630, 74 S.Ct. 460, *reh. den.* 347 U.S. 949, 98 L.Ed. 1096, 74 S.Ct. 637; *United Brotherhood of Carpenters & Joiners v. NLRB* (1958) 357 U.S. 93, 2 L.Ed. 2d 1186, 78 S.Ct. 1011; *Knetsch v. United States* (1960) 364 U.S. 361, 5 L.Ed. 2d 128, 81 S.Ct. 132; *Beck v. Washington* (1962) 369 U.S. 541, 8 L.Ed. 2d 98, 82 S.Ct. 955, *reh. den.* 370 U.S. 965, 8 L.Ed. 2d 834, 82 S.Ct. 1575; *Namet v. United States* (1963) 373 U.S. 179, 10 L.Ed. 2d 278, 83 S.Ct. 1151; *J.I. Case Co. v. Borak* (1964) 377 U.S. 426, 12 L.Ed. 2d 423, 84 S.Ct. 1555; *Ryan v. United States* (1964) 379 U.S. 61, 13 L.Ed. 2d 122, 85 S.Ct. 232; *Pierson v. Ray* (1967) 386 U.S. 547, 18 L.Ed. 2d 288, 87 S.Ct. 1213; *United States v. O'Brien* (1968) 391

U.S. 367, 20 L.Ed. 2d 672, 88 S.Ct. 1673, *reh. den.* 393 U.S. 900, 21 L.Ed. 2d 188, 89 S.Ct. 63; *Winters v. United States* (1968) 21 L.Ed.2d 80, 89 S.Ct. 57 (per Douglas, J., as Circuit Justice).

Absent any such constitutional issue, the purported questions presented in Point II. of the Petition devolve to a series of petty cavils, none of which is a federal constitutional question, or important.

B. Petitioner's Arguments That The California Supreme Court "Ignored" The Findings Of The Trial Court Are Merely An Argument That The Judgment Is Not Adequately Supported By The Evidence.

Petitioner's first arguments, that the California Supreme Court "ignored" the Findings of the Trial Court and decided the case based upon evidence not presented is actually merely an argument that the judgment is, in the Petitioner's opinion, not adequately supported by the findings or evidence. Those arguments, even if true, would present merely an issue of evidence and inference not appropriately reviewable by the United States Supreme Court on certiorari. *General Talking Pictures Corp. v. Western Electric Co.* (1938) 304 U.S. 175, 82 L.Ed. 1273, 15 S.Ct. 849.

First of all, Petitioner simply ignores the California Supreme Court's *holding* that, as a matter of California law, a landlord's blanket exclusion of all families with minor children is, or would still be, impermissible under the Unruh Act as "arbitrary discrimination" *even if the sweeping generalizations about the entire class of children made by the Culver Municipal Court Trial Judge were actually true.* (Opinion, Petition, Appendix "A", p. 39, *et seq.*) That holding undercuts Petitioner's argument that the trial court's findings were "ignored" by the California

Supreme Court, thus denying Petitioner due process, since it is clear that the California Supreme Court did consider them, but rejected them as insufficient as a matter of state law, (citing *Los Angeles Dept. of Water & Power v. Manhart* (1978) 435 U.S. 702, 708, 98 S.Ct. 1370, 1375, 55 L.Ed.2d 657). In fact, the California Court devoted an entire Point to its discussion of that proposition. Petitioner's actual argument, therefore, is only that it disagrees with the California law.

It is also submitted that the California Supreme Court, in determining the housing and civil rights policies of the state, is not necessarily bound by "findings" of a local trial court which purport to apply universally to an entire class, such as the class of children, any more than it would be bound by such "findings" with respect to the class characteristics of a racial, ethnic, religious or national group.

Petitioner's next argument, that the California Supreme Court based its decision upon "evidence not presented to the trial court," upon closer analysis, is actually nothing more than that the Calilfornia Court referred to published legal, statistical, sociological and demographic materials, as well as to policy statements enacted by the California Legislature and set forth in the California Statutes. The reference to, and reliance upon, such published materials pursuant to decisions of important public policy by state and federal courts has not previously appeared to have been thought a denial of due process. See *Taxpayers Assoc. of Weymouth Township v. Weymouth Township* (1976) 71 N.J. 249, 364 A.2d 1016; *Shepard v. Woodland Township Commission & Planning Commission* (1976) 71 N.J. 230, 364 A.2d 1005; *Green v. Superior Court* (1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168; compare *Brown v. Board of Education* (1954) 347 U.S. 483, 98 L.Ed.2d 873, 74 S.Ct. 686.

C. That In Other Contexts Some Courts Have Determined That Age Can Be An Appropriate Basis Of Classification Does Not Raise A Federal Issue.

Petitioner's next argument is that in other contexts some courts have determined that age can be an appropriate basis of classification, as in *Massachusetts Board of Retirement v. Mergia* (1976) 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520. No reason is given, nor is any apparent, why that raises a constitutional issue.[5]

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[5]Petitioner grie ously misstates the holding in *Halet v. Wend Investment Co.* (CA 9, 1982) 672 F.2d 1305. The holding of that case is actually coterminous with that in *Marina Point, Ltd. v. Wolfson* and, it is submitted, properly sets forth the constitutional issues and standards that would necessarily have to be applied if the constitutional issues were required to be reached. In *Halet*, the Ninth Circuit held that, where "state action" was involved on the part of the discriminating entity, the plaintiff's allegations that he was denied housing accommodations pursuant to that entity's policy of excluding families with children from its apartments was, as a matter of law, an allegation of a discrimination on the basis of deprivation of a "fundamental right" of privacy, procreation and family structure, so as to invoke the "strict scrutiny" test for the constitutionality of the exclusion. *Moore v. City of East Cleveland* (1977) 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531. The case was remanded to the District Court for a determination of whether the defendant could show a "compelling state purpose" to substantiate the discrimination.

The California Supreme Court was not required to reach those constitutional issues in *Wolfson*, as it said, because of its determination that the discrimination violated state law. However, the reasoning of the Ninth Circuit in *Halet* indicates that a contrary ruling on the state law issues, requiring the Court to reach and determine the constitutional issues, would require a reversal of the trial court's judgment on those constitutional grounds.

D. Even Assuming That The California Supreme Court Did Change Or Raise The Standard Of Analysis Of Prohibited Discrimination Under The California Statute, No Federal Or Constitutional Question Is Presented.

Petitioner's next argument appears to be that the California Supreme Court has changed or raised the standard of analysis or scrutiny of prohibited discrimination to "strict scrutiny"—i.e., to require a compelling interest to justify a class exclusion. While it is clear from the Opinion that the California Court did no such thing,[6] even if the contention had merit no federal constitutional issue is presented, for it is well established that a decision of a state court on a matter of law which overrules principles or doctrines established by previous decisions does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on the Supreme Court of the United States. *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930) 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107; *Central Land Co. v. Laidley* (1895) 159 U.S. 103, 15 S.Ct. 80, 40 L.Ed. 91; *Patterson v. Colorado* (1907) 205 U.S. 454, 27 S.Ct. 556, 51 L.Ed. 879; *Erie Railroad Co. v. Solomon* (1915) 237 U.S. 427, 35 S.Ct. 648, 59 L.Ed. 1033. The rule has been applied to arguments of "impairment of contract" by state court

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[6]The California Supreme Court's reference was to a "compelling *societal* interest," not a "compelling state purpose" (see Opinion, Petition, Appendix "A", p. 46) and the Court was clearly discussing policy considerations, not constitutional standards of scrutiny; the reference was pursuant to the Court's explanation of why age qualifications to a housing facility reserved for older citizens, which do serve such social interests, can be justified as "reasonable and permissive means under the Unruh Act of establishing and preserving specialized facilities for those particularly in need of such services or environment, thus making an age restriction under those circumstances "reasonable" so as to be sustained under the Unruh Act.

decisions as to the meaning and scope of a statute, the validity of which, as here, has not been denied. *Moore-Mansfield Const. Co. v. Electrical Installation Co.* (1914) 234 U.S. 619, 34 S.Ct. 941, 58 L.Ed. 1503; *Cleveland and P.R. Co. v. Cleveland* (1914) 235 U.S. 50, 35 S.Ct. 21, 59 L.Ed. 127. These cases make it clear that even if the California Supreme Court had, in fact, altered California's standard for the determination of the lawfulness of discrimination under the Unruh Act, such change does not rise to a constitutional issue reviewable on certiorari by this Court.

E. Even Assuming That The California Supreme Court's Recognition Of A Possible Exception For "Senior Citizens" Housing Creates A "Vagueness" In The Statute, Petitioner Is Without Standing To Assert Such Vagueness.

Finally, Petitioner asserts, as a purported constitutional issue, that the California Supreme Court's indication of the possible existence of an exception for housing for senior citizens or the elderly makes the statute impermissibly vague.

First of all, Petitioner does not have standing to assert such "vagueness" of the statute, and therefore cannot raise such an issue for review by certiorari here: Marina Point excludes only children under eighteen, and does not purport to be a "senior citizens" housing accommodation, nor to have been designed to offer the specialized services and facilities required by such housing devoted to the needs of that or any other social group. It merely discriminates against children. It is well settled that, except in the area of First Amendment freedoms, a litigant does not have standing to assert the rights of absent third parties, or injuries to such third parties by which it is not, and cannot be, affected. See, *Flast v. Cohen* (1968) 392

U.S. 83, 88 S.Ct. 1942, 20 L.Ed. 2d 947 citing *Baker v. Carr* (1962) 369 U.S. 186, 204; *Heald v. District of Columbia* (1922) 259 U.S. 114, 123; *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.* (1912) 226 U.S. 217.

Nor is Petitioner's position aided by attempting to describe the statute as "penal." While it is true that the Unruh Act, because it imposes a minimum level of damages in an action brought for a violation of its provision, could *in that context* arguably be described as "penal," that context does not exist in the case at bar. It has long been recognized in California, and indeed has been acknowledged by Petitioner in this action, that if a landlord's exclusion contravenes statutory or constitutional strictures, such illegality provides a valid defense to an unlawful detainer action. (See Opinion, Petition, Appendix "A", p. 29 and cases cited; compare *Edwards v. Habib* (1968) 130 U.S. App. D.C. 126, 397 F.2d 687, *cert. den.* (1969) 393 U.S. 1016, 89 S.Ct. 618, 21 L.Ed.2d 560.) Therefore, Petitioner is without standing to assert the purported unconstitutionality of a "penalty" to which it has not been and cannot be subjected in this case, nor to rely upon standards for the construction of *criminal* statutes totally inapplicable here.

In sum, Petitioner merely disagrees, for obvious reasons, with the California Supreme Court's interpretation of "reasonableness" as a matter of California law and, as with other perpetrators of discriminatory practices, would prefer to believe that its class-based discrimination in general, and its discrimination against the class of children in particular, should be deemed reasonable—or at least permissible—under the laws of its state, notwithstanding that California, in the exercise of its police power, has prohibited such arbitrary discrimination. Such disagreement by an unsuccessful litigant in state court does not and cannot create a federal question so as to confer jurisdiction

for United States Supreme Court review by certiorari, and the Fourteenth Amendment cannot be used as a vehicle to bring to this Court such unsuccessful litigants' abstract opinions upon the merits of state legislation upon which the lower court's decision is founded. *Davidson v. New Orleans* (1878) 96 U.S. 97, 24 L.Ed. 616.

CONCLUSION

In the absence of any constitutional attack upon the holding of the California Supreme Court, or upon the construction of the California Civil Rights Act, the Petitioner does not present any federal question or constitutional issue of sufficient import to qualify for the United States Supreme Court's review by Writ of Certiorari. Petitioner's failure to meet the burden of demonstrating affirmatively that this Court has jurisdiction to review by certiorari alone requires denial of the Petition. Moreover, as to the one constitutional issue that might have been presented, the record demonstrates not only that Petitioner failed to raise it by timely Petition for Rehearing, so that it has never been presented to or passed upon by the California Supreme Court, but that Petitioner waived the issue by failing to raise it by timely motion at its first opportunity below and submitting itself to the jurisdiction of the California Supreme Court without objection.

For those reasons, the Petition should be denied.

Dated: September 3, 1982

Respectfully submitted,
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